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No. 93-1935

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-three million persons age fifty or older, dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. One of AARP's primary goals is to promote the economic security of individuals as they age, by increasing the availability, security, equity, and adequacy of public and private health benefits. Approximately eleven million of AARP's members

sixteen million AARP members are under age sixty-five. They are generally not eligible for Medicare and therefore, rely on employer-funded health benefits.

Since the day AARP was founded in 1958, access to health care has been a major association priority. AARP's interest in health care benefits for an aging work force stems from a longstanding commitment to address the health needs of older people.

Health insurance coverage is essential to adequate medical care in this country. AARP members are greatly concerned that they have adequate health insurance coverage, especially in the event of hospitalization, long-term disability or catastrophic illness. Significant barriers frequently faced by AARP members in obtaining such coverage are preexisting medical conditions or exorbitant costs.

Many of AARP's members accepted offers of early retirement from their employers in exchange for certain incentives including the employer's promise to continue their health benefits. If employers are permitted to eliminate or reduce coverage for retirees under an employee health insurance plan, notwithstanding corporate representations to the contrary, simply because of rising health care costs, it may be virtually impossible for an employee to obtain comparable coverage elsewhere. Since a number of illnesses which require extensive treatment occur more frequently in the older population, AARP members face significant risks from an employer which breaks its promise of continued health benefits during retirement.[1] Accordingly, AARP respectfully submits this brief amicus

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[1] Older workers, however, most of whom are not covered by Medicare or Medicaid, are the most vulnerable. David C. Stapleton, et al., Health Care Costs and Older Workers, ES-2, 3 (Sept. 29, 1993).

curiae.[2]

BACKGROUND

While the current issues in this case revolve around technical issues concerning how a plan can be amended under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., it is important to step back and look at what this case is really about. The uncontroverted evidence in this case indicates that Petitioner, the Curtiss-Wright Corporation, induced its employees to retire under the promise of full health benefits. These promises were expressly made to all employees on or before retirement by officials in Petitioner's benefits department. Joint Appendix at 907, 910, 942, 974, 1003-1004, 1059, 1060.

Petitioner did not offer these retirement benefits merely as an act of corporate generosity. Benefit consultants have identified retiree health coverage as an essential element to the success of early retirement incentive plans,[3] since individual employees do not feel that will be able to afford to pay the costs of private insurance, especially if they are too young for Medicare.[4]

Petitioner, having induced its employees to retire on the basis of the explicit promise of lifetime benefits, then changed the terms of the plan to state the contrary -- namely, that

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[2] The written consents of the parties have been contemporaneously filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[3] Deborah Shalowitz, "As Recession Drags On, Employers Take a Shine to Window Plan Options," Business Insurance, Sept. 7, 1992, at 3-4; J. Quinn and R. Burkhaser, Retirement Preferences and Plans of Older American Workers, 17-18 (Oct. 1990).

[4] "Hang Tough, or Take the Gold Watch Early?", Forbes, May 5, 1986, at 158.

benefits would not be paid to any person who retired from a Curtiss-Wright plan which was subsequently closed. It is this blatant breach of an expressly made promise which forms the sole basis for this litigation.

We find it ironic that Petitioner and its amici argue that upholding this decision, by inhibiting the unfettered ability to amend employee benefit plans, could "unsettle" such plans. It is not the plan or the plan sponsor that is "unsettled" when a person retires on the express promise of lifetime health benefits that is later revoked. As discussed below, upholding the lower court's decision will not prevent plan sponsors from amending their plan. The Third Circuit decision merely requires plan sponsors to comply with fundamental principles of corporate formalities, at a minimum, when amending their ERISA-covered plans. Curtiss-Wright Corp. v. Schoonejongen, 18 F.3d 1034 (3d Cir. 1994), aff'g, No. 84-4542, slip op. (D.N.J. Oct. 4, 1990) (unpublished bench opinion).

ARGUMENT

I. PETITIONER DID NOT COMPLY WITH THE REQUIREMENTS OF ERISA § 402(b)(3).

A. Petitioner Did Not Even Comply with Its Own Amendment Procedure and Therefore Did Not Meet the Requirements of ERISA § 402(b)(3).

Whether or not the Petitioner's vague "reservation of rights" language complies with the requirements imposed under section 402(b)(3) of ERISA, it is abundantly clear that Petitioner did not even meet its own self-imposed obligations in the instant case. Petitioner's plan amendment procedure, in its entirety, stated as follows:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

In this case, the District Court expressly found that "the Company" did not in fact amend the plan until 1990, and awarded damages on this basis. Thus, while Petitioner and its amici attempt to define the case as a legal issue revolving around the wording that must be set forth under ERISA § 402(b)(3) in order to retain the right to amend the plan, it is clear that whether or not the Petitioner's reservation of rights clause complied with ERISA, Petitioner failed to amend its plan properly.

It is not without irony that Petitioner now asserts that it properly amended the plan in 1983, given the fact that Petitioner had previously asserted that it had merely "clarified" its health plan. Only after the District Court made an express finding of fact that the inclusion of a new clause in the plan in 1983 terminating benefits of employees who retired from a plant that was subsequently closed "constituted an amendment of the plan, not a clarification of existing terms as defendant contends" (Schoonejongen, No. 84-4542, slip op. at 5) did the Petitioner then change its argument to the novel concept that various actions taken by its executives constituted compliance with formal plan amendment procedures.[2]

Having earlier acknowledged that it did not amend its plan, we fail to comprehend how Petitioner can now assert that it did in fact amend its plan, particularly in light of the complete lack of evidence that Petitioner ever took the first steps to formalize the dramatic changes it was implementing to its health plan.

While Petitioner and its amici argue the tired old saw that they are victims of "form over substance," the record of this case shows that at every step in this litigation the courts gave the benefit of the doubt to the Petitioner. Even after the District Court held that the Petitioner had "amended" rather than "clarified" its plan, and that the Petitioner had not provided the court with evidence of "written procedures" for such

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[2] Whether an informal unwritten procedure would have met the requirements of ERISA § 402(b)(3) is not before the Court.

amendments (Schoonejongen, No. 84-4542, slip op. at 7), the court would still have permitted the Petitioner to amend its plan through "informal" amendment procedures. In particular, the District Court heard evidence that an unwritten procedure might have existed whereby an executive committee would approve any changes to the plan. However, the District Court stated that "as the defendant admits, even those procedures were not followed in this case of the 1983 amendatory language." Id. Rather, the court found that the changes to the plan were included as a result of "routine redrafting" and were therefore not effective. Id. at 8.

Thus, the facts of this case simply do not support the alarmist language contained in each of the briefs of the Petitioner and its amici concerning the potential impact of the Third Circuit's decision on millions of other benefit plans. To be sure, the amendment procedures of many other benefit plans also contain "reservation of rights" language similar to that contained in Petitioner's plan. But in sharp contrast to the Petitioner, most benefit plans do in fact follow the procedures implicitly required by such a clause. As Judge Roth indicated in her concurring opinion, at the very least, a reservation of rights requires that the plan conform to the requirements imposed under state corporate law. Schoonejongen, 18 F.3d at 1039. In the instant case, since the Petitioner is registered as a Delaware corporation, this means that, at a minimum, the Petitioner's Directors must ratify corporate amendments, which Petitioner finally did in fact do in 1990. The District Court gave effect to the plan amendment from that time forward.

Given the fact that the lower court did give effect to the plan amendment from 1990 forward, following the Directors' ratification of the reduction in benefits, despite the express finding that Petitioner's plan amendment procedures was defective, we fail to see why this case would cast any doubt about employee plans in general. Under the decision below, even plans that are not in compliance with ERISA § 402(b)(3) will still be permitted to make plan amendments, so long as the plan amendments are ratified by the Directors of the company. At most, this case will only apply to plan sponsors, such as Petitioner, which do not respect fundamental notions of

corporate law.

B. Petitioner's "Reservation Of Rights" Clause Is Not A Procedure Within The Plain Language Of ERISA § 402(b)(3) And Thus That Section's Requirements Are Not Met.

The facts of this case are unique in that Petitioner did not follow its own amendment procedures or, for that matter, any corporate formalities. Thus, under even under an interpretation of ERISA § 402(b)(3) most favorable to the Petitioner, Curtiss-Wright still would not meet that section's requirements, and further interpretation of that section is unnecessary to decide this case. However, should the Court wish to provide additional analysis, it is clear that under the plain language of the statute, Petitioner's reservation of rights clause is not a procedure meeting the requirements of ERISA § 402(b)(3).

Petitioner and its amici argue that a reservation of rights clause meets the requirements for a procedure under section 402(b)(3). To accept their argument effectively reads that section out of the statute. Nothing in the statute supports these arguments.

In interpreting a statute one must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990), quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985).

ERISA § 402(b)(3) sets forth two requirements. The first is that "every employee benefit plan shall . . . provide a procedure for amending such plan." The second is that "every employee benefit plan shall . . . provide a procedure for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3).

Apparently, Petitioner and its amici conveniently confuse the right to amend a plan and the method by which one

goes about doing so. All one has to do is to read Petitioner's reservation of rights clause to understand the difference.

A reservation of rights clause permits the plan's fiduciaries to amend the plan. However, a reservation of rights clause is not a procedure. A procedure is "a way of performing or effecting something or a course of action." New Riverside University Dictionary, Webster's II 938 (1988). Thus, an amendment procedure is the mechanism by which the fiduciaries' rights are put into motion. To put it into the vernacular: the reservation of rights clause is the destination and the amendment procedure gets you where you want to go. The argument concerning a procedure for identification of persons with the authority to amend the plan is no different.

Thus, to accept a bare reservation of rights clause, without more, as meeting the requirements of ERISA § 402(b)(3) makes a mockery of the statute's express language and torpedoes Congress' intent.[8] As this Court has recently reminded litigants:

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[8] All parties agree that there is a dearth of legislative history explaining this section. To counter the plain language of the statute, amici United States provides a tortured analysis of the purposes of the section within the overall structure of ERISA. Brief of amici United States in support of Petitioner at 12 - 20. Because of the plain language of the statute this is not necessary. Connecticut National Bank v. Germain, 112 S. Ct. 1146, 1149 (1992), quoting Rubin v. United States, 449 U.S. 424, 430 (1992) ["Courts must presume that a legislature says in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."]. During its analysis amici United States makes a troublesome suggestion that ERISA's reporting and disclosure requirements are more important than ERISA's fiduciary duty requirements. There is no basis in either the statute or legislative history for this implication. See §§ 2, 101-110, & 401-413 of ERISA, 29 U.S.C. §§ 1001, 1021-1029, & 1101-1113 (1988 & Supp. V. 1993).

> . . . [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. See PBGC v. LTV Corp., 496 U.S. 633, 646-47 (1990). This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs [or defendants].

Mertens v. Hewitt Associates, 113 S. Ct. 2063, 2071 (1993). Because the language of ERISA § 402(b)(3) is plain, it must be enforced in accordance with its terms. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

II. SECTION 502(a)(1) OF ERISA AUTHORIZES THE REMEDY WHICH THE DISTRICT COURT PROVIDED TO THE RESPONDENTS IN THIS CASE.

The only conceivable remedy to rectify the Petitioner's abject failure to comply with the ERISA plan amendment procedures is to provide the Respondents with the benefits which they would have received absent the illegally promulgated plan amendment. ERISA clearly contemplates this result. Participants and beneficiaries have several avenues of relief:

> (a) A civil action may be brought -
>
> (1) by a participant or beneficiary
>
> * * *
>
> (B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits due to him under the plan.
>
> * * *

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Sections 502(a)(1) & (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) & (a)(3).

In the instant case, the District Court decision simply provided the remedy mandated under ERISA, and requested by the Respondents.[11] The Court awarded damages to the plaintiffs so that they could recover the benefits due them under the terms of the plan, pursuant to section 502(a)(1)(B) of ERISA.

The limited case law in this area clearly supports the view that a plan may not implement any plan provision which has not been promulgated pursuant to the requirements of ERISA and also accords with the remedy ordered by the District Court.

In a Seventh Circuit decision, Shoonmaker v. Employee Savings Plan, 987 F.2d 410 (7th Cir. 1993), the Court noted that while some courts have given effect to informal plan amendments which did not contradict the written plan amendments, the established rule was to invalidate plan amendments which are contrary to the written provisions of the plan. Id. at 412. In that case, the court held that a plan amendment that was not adopted pursuant to ERISA could not

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[11] Respondents framed their case as a suit to recover individual benefits. Petitioner and its amici conveniently forget that plaintiffs, not defendants, are masters of their claim and can decide the relief and hence the section of ERISA upon which they will rely. Cf. The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 25 (1913) ["Of course, the party who brings a suit is master to decide what law he will rely upon"].

be given effect, since it was in fact contrary to other terms in the plan. Accordingly, the court authorized damages to the plaintiff, pursuant to ERISA § 502(a)(1)(B) which permitted participants and beneficiaries to recover benefits due them under the plan.

In a recent case, Smith v. National Credit Union Administration Board, 36 F.3d 1077 (11th Cir. 1994), the Court of Appeals struck down an illegal plan amendment which had originally been promulgated through oral communications. Like the instant case, the plan later formally adopted the amendment in conformance with ERISA, but the Court nonetheless refused to give the amendment retroactive effect:

> We find no legally significant distinction between an oral amendment and an oral amendment which is formalized in a writing months or years later and retroactively applied to the time of the oral amendment. Because we find oral amendments impermissible, we likewise conclude that subsequently formalized and retroactively applied oral amendments are impermissible.
>
> * * * *
>
> Accordingly, we hold that any modification or amendment to an ERISA plan can be implemented or applied only after the amendment has been appropriately adopted in a formal, complete and written form.

36 F.3d at 1081.

The remedy fashioned by the District Court is not only permissible legal relief pursuant to section 502(a)(1)(B) of ERISA, but also comports with the equitable relief provisions authorized under section 502(a)(3) of ERISA. As this court has noted in various decisions, ERISA codified the common law of trusts. See, e.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), quoting, H.R. Rep. No. 93-533. Those

trust law principles clearly mandate as a matter of equity that a trust beneficiary be placed in the same position that he would have been in absent a breach by the fiduciary. In The Law of Trusts, for example, the authors describe the remedies which are available to the beneficiaries of a trust in order to protect their interests. These include specific enforcement of the trust, as well as "redress" for the breach of trust "by making specific reparation or by the payment of money or otherwise." A. Scott and W. Fratcher, The Law of Trusts, 4th Ed., Vol. III at 205-06.

Providing the amount of money lost by the participants as a result of the illegally promulgated amendment does not constitute "money damages." Even assuming that money damages for breaches by fiduciaries are not available under ERISA § 502(a)(3) -- an issue which the Supreme Court has not yet decided[2] -- the instant case does not present this issue. Rather, the District Court's judgement represents a classic equitable remedy permitted under the common law of trusts, which was codified by ERISA.

Permitting benefit plans to enforce the terms of illegal plan amendments would make a mockery of the protections built into ERISA and would provide a green light to fraudulent conduct. Whereas a Directors' meeting is a formal affair, with the Secretary of the Corporation taking minutes, abuses are bound to occur frequently if any corporate executive is permitted to amend the plan merely by inserting an "amendment" in a current plan. Faced with an employee who contracted an expensive illness for example, it would be all too easy for a plan to slip in a backdated plan "amendment" limiting benefits for that particular illness.

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[2] We note in this regard that the case of Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993), does not affect the outcome in this case, as Mertens was limited solely to the issue of money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. Of course, in the instant case, the issue involves a breach of duty by the fiduciaries.

Petitioner and its amici assert that ERISA § 502(a)(3) merely permits a participant or beneficiary to sue the plan in order to require the plan to reform its amendment procedures to comply with ERISA.[9] Such a proposition borders on the absurd.[10] The uncontroverted testimony in this case indicates that not a single participant or beneficiary was even aware that the plan "Constitution" even contained the obscure reservation of rights language that has been the focus of this litigation. Under the Petitioner's theory, the burden would be on the plan participants to research all plan provisions in order to determine which plan provisions do not comply with ERISA, and then hire a lawyer at their own expense to correct the deficient plans. Petitioner's theory essentially puts the burden on the plan participants and beneficiaries to ensure that the plan complies with ERISA, rather than the plan fiduciaries.

There is simply nothing in ERISA that imposes the burden of compliance on plan participants and beneficiaries for complying with ERISA. To the contrary, ERISA's entire statutory scheme places the responsibility for plan compliance squarely on the shoulder of the plan fiduciaries. For example, section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104, requires that a fiduciary act in accordance with the plan documents "insofar as such documents and instruments are consistent with the provisions of this subchapter [Title I of ERISA] and subchapter

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[9] See, e.g., Brief for amici Chamber of Commerce of the United States of America in support of Petitioner at 19; Brief for amici United States in support of Petitioner at 9.

[10] Just as absurd is the argument that although an amendment passed in violation of plan-specified procedures is invalid, an amendment passed in the absence of an amendment procedure required under ERISA § 402(b)(3) is not. See, e.g., Brief for amici United States in support of Petitioner at 9. On this basis, no plan would ever establish an amendment procedure because such a procedure could be used as a tool against it. Indeed, those plans without a procedure would be better off than those with a procedure.

III of this chapter."

At bottom, the relief ordered by the District Court was clearly appropriate under section 502(a) of ERISA. Any decision by this Court that a plan sponsor could enforce a plan provision which has the effect of drastically reducing benefits due the participants and beneficiaries, notwithstanding the fact that the provision was illegally promulgated, would make a mockery of ERISA's finely tuned enforcement mechanism.

CONCLUSION

For the foregoing reasons AARP respectfully asks the Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

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